U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 08 August 2003

CASE NO. 2003-CAA-15

In the Matter of:

JAMES G. BLODGETT, JR.,
Complainant

v.

TENNESSEE DEPARTMENT OF ENVIRONMENT AND CONSERVATION,
Respondent

Appearances:

Edward A. Slavin, Jr., Esq.
For the Complainant

Kim Kirk, Esq.
For the Respondent

Before: RICHARD A. MORGAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER OF DISMISSAL

FACTUAL AND PROCEDURAL HISTORY

Respondent is a government entity of the State of Tennessee and performs work in that state. On February 4, 2002, the complainant, James G. Blodgett, filed a complaint against the Respondent, Tennessee Department of Environment and Conservation ("TDEC"). 2003-CAA-7 (ALJ, January 28, 2003). In that case, complainant filed a whistleblower complaint citing blacklisting and discriminatory discharge for having engaged in protective activity under the following whistleblower provisions: the Clean Air Act ("CAA"), 42 U.S. C. §7622; the Safe Drinking water Act ("SDWA"), 42 U.S.C. §300j-9; the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. §6971; the Water Pollution Control Act ("WPPCA"), 33 U.S.C. §1367; the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9610; and the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §2622. *Id.*

Complainant was employed by Respondent until being discharged on June 14, 2001. Prior to his termination from the TDEC, the complainant was an Environmental Specialist IV Manager. Complainant alleged that on June 29, 2001, he was terminated by the TDEC after raising environmental concerns. Additionally, complainant alleged that on January 9, 2002, he discovered he had been coded as "not eligible for re-hire" in the TDEC system database, which he asserted was a form of internal blacklisting.

On November 14, 2002, the Occupational Health and Safety Administration ("OSHA") issued its findings after an investigation of the complainant's allegations. OSHA noted that the complainant lodged thirty two written allegations of misconduct against his supervisor in December of 2000. (*OSHA findings*, pg. 2). However, OSHA found that only one of these allegations related to the enforcement of environmental regulations and it was later found to be without merit. *Id*. Moreover, OSHA found that the complainant displayed a repeated pattern of confrontational and aggressive behavior toward management. *Id*. Specifically, the records indicate that on several occasions in June of 2001, the complainant had confrontations with the Assistant Commissioner and another management official. *Id.* During the final confrontation on June 12, 2001, complainant was physically and verbally hostile towards his manager, which prompted other employees to call 911. *Id*. OSHA found that none of these confrontations involved protected activities. *Id.* OSHA concluded that the complainant's history of aggressive behavior was the legitimate non-discriminatory reason for his termination. *Id.* OSHA further concluded that the complainant was terminated for cause.

That case was dismissed, on Respondent's motion, pursuant to the 11th Amendment of the United States Constitution due to the immunity of the State of Tennessee from a private individual's request for federal adjudication. In the instant matter, Mr. Boldgett alleges that he has been blacklisted in retaliation for having filed the above discussed environmental whistleblower complaint and having previously engaged in protected activity. Complainant further argues that the Supreme Court's recent decision in *Nevada v. Hibbs* removes respondent's sovereign immunity defense. OSHA investigated Blodgett's second complaint and later dismissed it for lack of merit. (*OSHA findings,* pg. 2). OSHA further found that the additional named Respondents Kim Kirk, Alan Payne, Pat Doe, et. al., were not employers under the definition of the statute and not party to the determination. (*OSHA findings,* pg. 2).

DISCUSSION

The Doctrine of Sovereign Immunity Precludes the Complainant from Pursuing a Federal Environmental Whistleblower Claim Against the Respondent, a State Agency.

The doctrine of sovereign immunity originates from the Eleventh Amendment of the U.S. Constitution which provides "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced, or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., Amdt. 11. The United States Supreme Court has held for over a century that federal jurisdiction over

suits against nonconsenting states "was not contemplated by the Constitution when establishing the judicial power of the United States." *Seminole Tribe of Florida v. Florida et. al.*, 517 U.S. 44, 54, 116 S.Ct.1114, 1122 (1996), *citing Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L. Ed. 842 (1890). *See also: Nevada v. Hibbs*, 123 S.Ct. 1972 at 1977 (2003); *Board of Trustees of Ala. v. Garett*, 531 U.S. 356, 363 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72-73 (2000); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 669-670 (1999).

More recently, in *Federal Maritime Commission v. South Carolina State Ports Authority et. al.*, 122 S.Ct. 1864 (2002), the Supreme Court held that a private citizen cannot file a complaint against a State with a federal agency. The Supreme Court found that State sovereign immunity extends to proceedings before a federal Administrative Law Judge. In *Federal Maritime Commission*, South Carolina Maritime Services, Inc. ("Maritime Services"), filed a complaint with the Federal Maritime Commission ("FMC"), alleging that the South Carolina State Ports Authority ("SCSPA") violated the Shipping Act of 1984, by denying Maritime Services permission to berth a cruise ship at the SCSPA's port facilities. The complaint was forwarded to an Administrative Law Judge, who found that the SCSPA, as an agency of the State of South Carolina, was entitled to sovereign immunity and therefore dismissed the case. The Supreme Court reasoned that the preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities. *Federal Maritime Commission*, 122 S.Ct. at 1874, citing *In re Ayers*, 123 U.S. 443, 505, 8 S. Ct. 164, 31 L.Ed. 216 (1887). The Court added that given both this interest in protecting States' dignity and the strong similarities between FMC proceedings and federal civil litigation, state sovereign immunity bars the FMC from adjudicating complaints filed by a private party against a non-consenting state. [1] *Id.* The Court concluded that the affront to a State's dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court. *Id.*

Similarly, in *Rhode Island Department of Environmental Management v. United States*, 304 F.3d 31 (2002), the First Circuit Court of Appeals, relying on *FMC*, held that sovereign immunity prevented state agency employees from seeking monetary and injunctive relief for alleged violations of the Solid Waste Disposal Act's whistleblower provision. Specifically, the court found that Congress did not abrogate state sovereign immunity when it enacted SWDA's whistleblower provision. *Id.*, at 45. Further, the First Circuit found that a "state is generally capable of invoking sovereign immunity in proceedings initiated by a private party under federal regulations setting forth procedures for handling discrimination complaints under federal employee protection statutes." *Id.*, at 46.

[1] The Supreme Court noted that a review of the FMC's Rules of Practice and Procedure confirms that FMC administrative proceedings bear a remarkably strong resemblance to civil litigation in federal courts, in that: FMC's rules governing pleadings are similar to those found in the Federal Rules of Civil Procedure; discovery in FMC adjudications largely mirrors discovery in federal litigation; and the role of the ALJ is similar to that of an Article III Judge. *Federal Maritime Commission*, at 1873.

Additionally, in an earlier decision, the District Court of Connecticut granted a preliminary injunction holding that state sovereign immunity barred federal administrative investigations and adjudicatory proceedings under the whistleblower provisions of the Clean Air Act, Safe Drinking Water Act, and Solid Waste Disposal Act. *State of Connecticut Department of Environmental Protection v. OSHA*, 138 F.Supp. 2d 285 (2001). *See Also, State of Ohio EPA v. U.S. Department of Labor*, 121 F.Supp. 2d 1155 (S.D. Ohio 2000). In *State of Florida v. United States,* the district court held that state sovereign immunity bars the commencement and prosecution of a federal administrative proceeding by a private individual against a state, to the same extent as would be true with respect to a private individual's lawsuit in federal or state court. 133 F.Supp.3d 1280 (N.D. Fla. 2001).

Consistent with the holding in *Federal Maritime Commission*, *supra*, I find the present claim is barred by State sovereign immunity. Here, the complainant, a state employee, has filed a federal whistleblower claim against the TDEC, a state agency. Tennessee has filed a motion to dismiss evidencing a lack of consent to being sued in this forum. The Department of Labor has not elected to prosecute this matter, as OSHA found the complaint to be without merit. *See generally, State of Ohio EPA v. United States Department of Labor.* As a result, there is no dispute that this is a private cause of action instituted by a private individual against a state. Moreover, Congress did not provide for an abrogation of State sovereign immunity, with the enactment of the whistleblower protection provisions, nor has the TDEC waived its sovereign immunity.

The United States Supreme Court Ruling in Nevada v. Hibbs Does Not Affect the Applicability of the Doctrine of Sovereign Immunity to the Present Claim.

Complainant contends that the Supreme Court's decision in *Nevada v. Hibbs*, 123 S.Ct. 1972 (2003), "shows beyond a doubt that there is no merit to Respondent's sovereign immunity defense." Complainant's Opposition at 3. I disagree. A close reading of *Hibbs* demonstrates that the opinion synthesizes varied principles, as well as limitations, to the doctrine of sovereign immunity. However, the opinion does not change the Court's jurisprudence in terms of state sovereign immunity and in no way affects the applicability of the doctrine to the instant matter.

Hibbs, a former employee of the Nevada Department of Human Resources, brought suit in federal district court against the Department, its Director, and a supervisor alleging violation of the Family and Medical Leave Act of 1999 (FMLA)[2]. *Hibbs*, 123 S.Ct. at 1976. FMLA provisions create a private right of action against "any employer (including a public agency)," 29 U.S.C. § 2617(a)(2), that "interferes with, restrains, or denies the exercise" of FMLA rights, 29 U.S.C. § 2615(a)(1). The district court awarded summary judgment in favor of the state on the

[2] Hibbs sought leave to care for his wife under FMLA, which entitles an eligible employee to 12 work weeks of unpaid leave per year. *Hibbs*, 123 S.Ct. at 1976. *See* 29 U.S.C. § 2612(a)(1)(c). The Department granted his leave, but later informed Hibbs that he had to return to work as the leave had been exhausted. *Hibbs*, 123 S.Ct. at 1976.

ground that the Eleventh Amendment of the United States Constitution barred Hibbs' FMLA claim. *Hibbs,* 123 S.Ct at 1976. The Ninth Circuit reversed and the Supreme Court granted *certiorari* "to resolve a split among the Court of Appeals on the question whether an individual may sue a state for money damages in federal court for a violation of § 2612(a)(1)(c)" of the FMLA. *Id.*

The Supreme Court ruled, in *Hibbs,* that a state employee may recover money damages in federal court in the event of the state's failure to comply with the family care provision of FMLA. *Id.* In so ruling, the Court states that their jurisprudence makes "clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting states. *Id.* (*citing Seminole Tribe of Florida v. Florida et. al.*, 517 U.S. 44, 54, 116 S.Ct.1114, 1122 (1996), *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L. Ed. 842 (1890); *Board of Trustees of Ala. v. Garett,* 531 U.S. 356, 363 (2001); *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 72-73 (2000); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 669-670 (1999)). However, It is well settled that there are two recognized exceptions to Eleventh Amendment state sovereign immunity: one, where Congress expressly authorizes such a suit through enforcement of §5 of the Fourteenth Amendment; and two, where the state unequivocally consents to being sued. *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670, 119 S.Ct. 2219 (1999).

In reaching their conclusion in *Hibbs,* the Court detailed both exceptions. 123 S.Ct. 1972. In terms of the first exception, Congress may abrogate state sovereign immunity if two criteria are met. *Id.,* at 1976. First, Congress must make its intention to abrogate unmistakably clear in the language of the statute. *Id.* (*citing Garret, supra,* at 363, 121 S.Ct. 955; *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786, 111 S.Ct. 2578 (1991); *Dellmuth v. Muth*, 491 U.S. 223, 228, 109 S.Ct. 2397 (1989)). Second, Congress must have been acting "pursuant to a valid exercise of its power under section 5 of the Fourteenth Amendment." *Ibid.*

Complainant has asserted that the legislative history of the Clean Air Act establishes that Congress intended to abrogate State sovereign immunity to claims filed under the employee protection provision of the Act. In support of his argument, complainant points to language contained in a Committee Proposal regarding the employee protection provision of the Clean Air Act. Specifically, the proposal language states that, "[t]his section is applicable, of course, to Federal, State, or local employees to the same extent as any employee of a private employer." H.R. Rep. No. 294, 1977 USCANN 1077, 1404-05. However, I find that this language insufficient to constitute a waiver of State sovereign immunity. The Supreme Court reiterated in *Hibbs* that Congressional intent to abrogate must be unmistakable clear in the language of the statute. 123 S.Ct at 1976. Committee Proposals are not statutory language. Furthermore, a statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text. *Lane v. Pena, Sec'y of Transportation, et. al.*, 518 U. S. 187, 192, 116 S.Ct. 2092, 2096, 135 L.Ed. 2d 486 (1996). Nowhere in any of the environmental whistleblower provisions is there an expressed intent to abrogate state sovereign immunity. *See,* 42 U.S.C. §7622; 42 U.S.C. §300j-9; 42 U.S.C. §6971; 33 U.S.C. §1367; 42 U.S.C. §9610; 15 U.S.C. §2622. Complainant

fails to satisfy the first criterium required to show Congressional abrogation.

Because Complainant has not demonstrated an "unequivocal expression" of Congress' intent to abrogate state sovereign immunity, his argument must fail. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). However, it should be noted that, *assuming arguendo,* Complainant could pass the first requirement, there in no indication that the environmental whistleblower statutes were an exercise of Congressional power under Section 5 of the Fourteenth Amendment.[3] The Supreme Court has recognized that Congress may enforce its authority under section 5 of the Fourteenth Amendment by authorizing suit in federal court against a state by a private individual. *College Savings Bank*, 527 U.S. 666, 119 S.Ct. 2219.

In his Opposition, Complainant argues that "both the equal protection and due process components of §5 apply, as TDEC discriminated, denying equal protection, and TDEC also violated Mr. Blodgett's right to any due process." Complainant has misconstrued the abrogation requirements laid out in *Hibbs.* It is irrelevant to this analysis whether the conduct complained of here and now violates Fourteenth Amendment guarantees. The criterium dictates that the legislation involved was enacted pursuant to Congress' Section 5 power to enact legislation which protects Fourteenth Amendment rights. Again, Complainant fails to offer the undersigned any indication that the environmental whistleblower provisions were enacted by Congress pursuant to its Section 5 powers.

In *State of Ohio EPA v. United States Department of Labor,* the district court held that there was no expression of Congressional intent that the employee protection provisions of the Clean Air Act (CAA), the Water Pollution Prevention and Control Act (WPPCA), and the Toxic Substances Control Act (TSCA) were enactments under the Fourteenth Amendment. No. C2-00-1157, 2000 WL 1721083 (N.D. Ohio 2000). The district court went on to note that if Congress has validly enacted legislation creating a private cause of action against a state, such legislation must be based upon the Fourteenth Amendment, rather than the Interstate Commerce Clause, in order to pass constitutional muster. *Id. See also, Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (abrogation of state sovereign immunity cannot be born of legislation enacted under the Commerce Clause). Moreover, the district court found that environmental whistleblower statutes were enacted by Congress pursuant to its authority under the Commerce Clause. *State of Ohio EPA*, No. C2-00-1157, 2000 WL 1721083 (*citing Michigan Peat v. United States Environmental Protection Agency*, 175 F.3d 422 (6th Cir. 1999)).

There is no indication that Congress intended to abrogate state sovereign immunity by the

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[3] Section 5 of the Fourteenth Ammendment gives Congress the power to enforce substantive guarantees of the amendment through the enactment of "appropriate legislation." *See City of Boerne v. Flores*, 521 U.S. 507, 536, 117 S.Ct. 2157 (1997). Section 1 of the Fourteenth Amendment provides, in part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
> U.S. Const. amend. XIV, § 1.

promulgation and enactment of any of the environmental whistleblower statutes and there is no expression of Congressional intent that these statutes were enactments under the Fourteenth Amendment. *See Powers v. Tennessee Department of Environment and Conservation*, 2003-CAA-16 (ALJ July 14, 2003). Furthermore, in all other statutes where Congress expressly acted to abrogate state sovereign immunity, the available remedies included recourse to a full trial in federal court. *State of Ohio EPA*, No. C2-00-1157, 2000 WL 1721083. However, under the environmental whistleblower provisions, a claimant has no right to a trial *de novo* in federal court. *Id. See also, Powers*, 2003-CAA-16 (ALJ July 14, 2003).

Section 7418 of the Clean Air Act, titled "Control of pollution from Federal Facilities", contains a waiver clause, authorizing state suits against federal facilities for recovery of civil penalties assessed under state clean air statutes.[4] The waiver provision provides for a waiver of Federal, not State, sovereign immunity.[5] Second, the waiver provision expressly states that is only applicable to §7418, and therefore, the clause does not apply to §7622, the employee protection provision. Moreover, §7622 does not contain a similar waiver provision. It is a longstanding theory of statutory interpretation that "[w]here Congress includes particular language in one section of a statute but omits it another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Bates v. United States*, 522 U. S. 23, 29-30, 118 S. Ct. 285, 139 L.Ed. 2d 215 (1997).

Section 7604 of the Clean Air Act, entitled "Citizen Suits," creates a private right of action for individuals to sue "any person" alleged to have violated certain provisions of the Act. 42 U.S.C. § 7604(a)(1). That section states that "any person" includes the United States and "any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment." *Id.* In *Rhode Island Department of Environmental Management v. United States,*

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[4] The complainant argued that pursuant to *United States v. Tennessee Air Pollution Control Board*, 967 F. Supp. 975 (M.D. Tenn. 1997), the State of Tennessee has no sovereign immunity with respect to claims filed under the Clean Air Act. In *Tennessee Air Pollution Control Board* ("TAPCB"), the Court held that the Clean Air Act's federal facilities and citizen suit provisions waive United States' sovereign immunity from state law punitive civil penalties imposed to force federal facilities to comply with state standards.

[5] § 7418. Control of pollution from Federal facilities states:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any non-governmental entity... **This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is not otherwise liable.**

the First Circuit Court of Appeals analyzed a similar provision in the Solid Waste Disposal Act which indicated that citizen civil suits could be used to enforce SWDA provisions only to the extent permitted by the Eleventh Amendment. 304 F.3d at 51. *See*, 42 U.S.C. §6972(a)(1). The First Circuit viewed that provision as evidencing an "intent not to disturb states' traditional immunity from suit" by Congress. *Id.*, at 51.

Similarly, I find no merit in the complainant's assertion that the State of Tennessee has "constructively waived" its sovereign immunity by accepting millions of dollars in federal funding for environmental programs. The Supreme Court has held that when deciding whether a State has waived its constitutional protection under the Eleventh Amendment, they will find waiver only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction. *Edelman v. Jordan* et. al., 415 U. S. 651,673, 94 S.Ct. 1347, 1361 (1974).

Complainant has not alleged sufficient facts to demonstrate that the State of Tennessee has waived its immunity from federal environmental whistleblower claims. Furthermore, the Supreme Court has held that the fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts. *Id.* In *Rhode Island Department of Environmental Management, supra*, the First Circuit rejected the argument that by accepting federal funds on the condition that the state abide by federal laws prohibiting discrimination, the state of Rhode Island waived sovereign immunity with respect to a private whistleblower suit. 304 F.3d 31. Accordingly, I find that the State of Tennessee has not waived its sovereign immunity to the present claim.

There is no evidence that the Congress abrogated the States' sovereign immunity with the enactment of the above-cited whistleblower protection provisions. Additionally, there is no evidence that the State of Tennessee waived its sovereign immunity, expressly or constructively, for the violations alleged herein. In accordance with the holding in *Federal Maritime Commission, supra*, I find that state sovereign immunity precludes the complainant from seeking relief for the alleged violations.

Kim Kirk, Alan Payne, Pat Doe, et al. Are Not Proper Respondents under the Federal Environmental Whistleblower Provisions

Complainant contends that all parties named are "proper Respondents," including people whom the undersigned assumes, though Complainant offers no evidence of, are in some manner employed by the Tennessee Department of Environment and Conservation. Claimant's Opposition at 1. The named respondents at issue are Kim Kirk, Alan Payne, Pat Doe, et al. Complainant's Opposition at 1. Complainant emphasizes that environmental whisleblower protection laws "forbid retaliation not merely by employers, but by 'persons.'" Complainant's Opposition at 2.

In *Gass v. United States Department of Energy*, the complaint included several Department of Energy employees as named respondents. 2002-CAA-2 (ALJ November 20, 2002). In the Recommended Decision and Order, the ALJ analyzed whether individuals can be held liable under the CAA, SDWA, and SWDA. *Id.* The ALJ concluded that the CAA and SDWA were governed by the Secretary's decision in *Stephenson v. NASA*, 1994-TSC-5 (Sec'y July 3, 1995), in which the Secretary observed that while several paragraphs in the CAA's whistleblower provisions reference "person," the substantive prohibition contained in Section 7622(a) references "employer."[6] In *Stephenson*, the Secretary found that "the plain language of these employee protection suggests that they were intended to apply to person who are employers . . . [a]ny other construction would require a clearer statement of intent." 1994-TSC-5 (Sec'y July 3, 1995). In sum, the Secretary held in *Stephenson* that individuals were not subject to suit under the whistleblower provisions of the TSCA and the CAA, which prohibit "employers" from retaliating against employees who engage in protected activity. *Id. See also, Lewis v. Synagro*, 2002-CAA-8, 12, 14 (ALJ April 26, 2002); *Varnadore v. Oak Ridge National Laboratory*, 1992-CAA-2 (ARB June 14, 1996).

In *Gass*, discussed *supra*, the ALJ found the question of individual liability under the SWDA more difficult, in part because that statute uses the term "person" rather than "employer" in its prohibition section.[7] The ALJ concluded that personal liability does not attach under the SWDA once the statute's entire employee protection provisions are considered as a whole. *Gass*, 2002-CAA-2 (ALJ November 20, 2002) (noting that viewing the entire employee protection provisions as a whole was the approach taken by the Secretary in *Stephenson)*. The ALJ in *Gass* further observed that the remedies provided for in the SWDA demonstrated an intent to have employers, rather than individuals, make whole a wronged employee. *Id.* Section 6971(b) of the SWDA indicates that if a violation has occurred, the party committing the violation is required to take such affirmative actions as the Secretary of Labor deems appropriate, including rehire and reinstatement. *Id. See* 42 U.S.C. § 6971(b). The ALJ properly noted that individual liability under the SWDA would produce respondents without the power to effect the remedies of re-employment and reinstatement mandated by the Act. *Id.* Furthermore, as discussed in *Gass*, 29 C.F.R. § 24.2(a)[8] uses the term "employer" and the regulations do not set out any such prohibition for an individual or person who is not an employer.

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[6] For clarification, Section 7622(b)(1) of the Clean Air Act states that "any employee who believes that he has been discharged or otherwise discriminated against by any *person* in violation of subsection (a)" can file a complaint with OSHA. [emphasis added]. However, for a "person" to be in violation of subsection (a), he or she must be an employer, as subsection (a) states "[n]o employer may discharge any employee or otherwise discriminate against any employee."

[7] *See* 42 U.S.C. § 6971(a). That provision states that "[n]o person shall fire, or in any other way discriminate against, . . . , any employee." *Id.*

[8] 29 C.F.R. Part 24 implements the employee protection provisions of the following statutes: Safe Drinking Water Act; Water Pollution Control Act; Toxic Substances Control Act; Solid Waste Disposal Act; Clean Air Act; Energy Reorganization Act; Comprehensive Environmental Response, Compensation and Liability Act.

The ARB has held that environmental whistleblower protections may extend beyond an employee's immediate employer, notwithstanding the fact that the other employer does not directly compensate or immediately supervise the employee. *Stephenson*, 1994-TSC-5 (Sec'y July 3, 1995). *See also, Williams v. Lockheed Martin Energy Systems, Inc.*, 1995-CAA-10 (ARB January 31, 2001). The real issue where complainant seeks personal liability against persons who are not the employer is "did [the respondent] act as an employer with regard to the complainant . . . by exercising control over production of the work product or by establishing, modifying or interfering with the terms, conditions or privileges of employment." *Stephenson*, 1994-TSC-5 (Sec'y July 3, 1995).

In the instant matter, Complainant has provided the undersigned no evidence and has alleged no facts which would support a finding that the individuals named in his filings acted as his employer. Moreover, pursuant to Tennessee law, state officials and employees are absolutely immune from liability for acts or omission within the scope of their office or employment, except for willful, malicious, or criminal acts or omissions, or acts or omissions done for personal gain. *See*, TNS Section 9-8-307(h). *See also, Powers*, 2003-CAA-16 (ALJ July 14, 2003). Complainant has failed to allege any facts which would suggest the individuals named as respondents in his filings acted other than within the scope of their office or employment or that they acted in such a manner as to subject them to personal liability. *See Powers*, 2003-CAA-16 (ALJ July 14, 2003). As such, I find that Kim Kirk, Alan Payne, Pat Doe, et al. are not proper respondents.

ORDER

It is hereby ordered that the Motion to Dismiss, filed on behalf of the Respondent, the Tennessee Department of Environment and Conservation, is **GRANTED**, and this matter is dismissed.

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RICHARD A. MORGAN
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§24.7(d) and 24.8.